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PROCEDURALISATION'S TRIUMPH AND ENGAGEMENT'S PROMISE IN SOCIO-ECONOMIC RIGHTS LITIGATION

BRIAN RAY*

ABSTRACT

Three of the Constitutional Court's socio-economic rights decisions of the 2009 term are the culmination of a strong trend towards the proceduralisation of socio-economic rights that many commentators have argued fails to fulfil their original promise. This triumph of proceduralisation undeniably restricts the direct transformative potential of these rights. But there is another aspect to this trend – an aspect reflected in the Court's emphasis on participatory democracy and the ability of procedural remedies to democratise the rights-enforcement process. This article considers what the triumph of proceduralisation means for future social and economic rights litigation and argues that properly developed the engagement remedy can give poor people and their advocates an important and powerful enforcement tool. At the same time, engagement can help strengthen and promote consistent attention to the constitutional values these rights protect. Tapping this potential requires the Constitutional Court and lower courts to apply the remedy more consistently, to develop its requirements more fully and to apply those requirements robustly where government fails to engage meaningfully on social welfare policy. The courts are only the starting point, however. For engagement to truly succeed, government must develop comprehensive engagement policies and institutionalise those policies at all levels. Finally, civil society must expand its role beyond pressing for engagement in individual cases into advocating for such institutionalisation.

Writing for a unanimous Court in the water-rights case *Mazibuko v City of Johannesburg*, Justice Kate O'Regan summarised the reasonableness review the Court has applied in each of its socio-economic rights cases:

A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy ... If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought.¹

She then explained, '[i]n this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation'.²

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1 2010 (4) (CC) para 71. In this case the Court rejected claims by residents of Soweto that the installation of prepaid water meters and the City of Johannesburg's broader water policy violated their right to access to water in s 27 of the Constitution of the Republic of South Africa, Act 108 of 1996. *Ibid* para 169.

2 *Ibid*.

This is the strongest statement yet of the Court's preference for procedural remedies that promote political solutions when addressing social and economic rights claims. But, as O'Regan J herself described in a survey of the Court's socio-economic rights jurisprudence preceding this summary, it is consistent with the Court's approach in nearly all of those decisions.³

This concern with procedure and the democratic values it promotes – what the Court often calls 'participatory democracy'⁴ – is evident in three other socio-economic-rights decisions of the 2009 term. In *Joseph v City of Johannesburg* – in which the Court upheld a challenge by Johannesburg residents to the City's failure to provide adequate process before terminating electricity services – the Court emphasised that '[c]ompliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy'.⁵

In *Abahlali baseMjondolo Movement of SA v Premier of the Province of KwaZulu-Natal*, a Durban-based shack-dweller's movement challenged the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 arguing that the eviction provisions (s 16) of the Act violated s 26 of the Constitution, in particular the newly established engagement requirement.⁶ After rejecting Justice Yacoob's expansive interpretation that the Act could be read to require mitigating procedures, including engagement, prior to eviction, the Court held the Act invalid for its failure to 'ensure that [residents'] housing rights are not violated without proper notice and consideration of other alternatives'.⁷

Finally, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, the Court revisited the engagement remedy – this time deploying it to return some measure of control to the more than 20,000 residents whose eviction it approved as part of the N2 redevelopment project.⁸ Despite finding

3 Ibid para 65 (in its earlier cases, '[t]he Court did not seek to draft policy or to determine its content. Instead, having found that the policy adopted by government did not meet the required constitutional standard of reasonableness, the Court, in *Grootboom*, required government to revise its policy to provide for those most in need and, in *Treatment Action Campaign No 2*, to remove anomalous restrictions'). The one notable exception is *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) in which the Court ordered the government to extend social welfare benefits to permanent residents. As Jackie Dugard has pointed out, however, the exceptional willingness to set policy directly in *Khosa* may be attributable to the equally strong s 9 equality dimension of the case. See J Dugard 'Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice' (2008) 24 SAJHR 214, 235. Moreover, even in that case the Court merely extended a benefit created by the legislature rather than crafting a completely new one.

4 The Court has expressed concern with developing participatory democracy in contexts outside of the socio-economic rights case. See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC).

5 2010 (4) SA 55 (CC) para 46. *Joseph* principally deals with the Promotion of Administrative Justice Act 3 of 2000 (PAJA). But the residents argued that the City's termination without sufficient notice violated their right to access to adequate housing under s 26 of the Constitution, which, broadly understood, puts the case in the realm of socio-economic rights decisions.

6 2010 (2) BCLR 99 (CC).

7 Ibid para 122, the discussion of engagement is at paras 113–5.

8 2010 (3) SA 454 (CC).

that the City of Cape Town had meaningfully engaged with the residents, the Court issued a detailed order and agenda requiring the City to engage further over the timing and details of the eviction process – a requirement that ultimately led to the City's decision to postpone the eviction plans and reconsider the in situ upgrade the residents had sought.⁹ The Court recently responded by setting aside its original eviction order because the government's 21-month delay in proceeding with the eviction and apparent decision to pursue in situ upgrade instead rendered the original order – and most importantly the engagement process it required – impossible to implement.¹⁰

Taken together, these cases are the culmination of a strong trend towards the proceduralisation of socio-economic rights that many commentators have argued fails to fulfil their original promise.¹¹ This triumph of proceduralisation undeniably restricts the direct transformative potential of these rights. But there is another aspect to this trend – an aspect reflected in the Court's emphasis on participatory democracy and the ability of procedural remedies to democratise the rights-enforcement process. Engagement is the most concrete manifestation of this aspect and, as the *Joe Slovo* result partially illustrates, robust development of engagement promises to address some of the concerns that proceduralisation raises. It also offers an alternative mechanism for enforcing social and economic rights largely outside of direct litigation.

This article considers what the triumph of proceduralisation means for future social and economic rights litigation and argues that, properly developed engagement can give poor people and their advocates an important and powerful enforcement tool.¹² At the same time, engagement can help strengthen and promote consistent attention to the constitutional values these rights protect. Tapping this potential requires the Constitutional Court and lower courts to apply the remedy more consistently, to develop its requirements more fully and to apply those requirements robustly where government fails to engage meaningfully on social welfare policy. The courts are only the starting point, however. For engagement to truly succeed, government must develop comprehensive engagement policies and institutionalise those poli-

9 The government's decision to postpone and reconsider was reported by A Majavu 'Evictions Suspended – Shack Dwellers Reprieved' *Sowetan* (4 September 2009).

10 In the matter between *Residents of Joe Slovo Community, Western Cape* CCT 22/08 [2011] paras 30–1 (*Joe Slovo II*).

11 Danie Brand coined the term 'proceduralisation' in D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What Are Socio-Economic Rights For?"' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33. David Bilchitz has been a consistent critic of the Court's failure to incorporate a minimum core requirement and its preference for procedural remedies. See D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1, 8–11. More recently, Theunis Roux has characterised the Court's socio-economic rights jurisprudence as part of a broader attempt to preserve its institutional security against the African National Congress (ANC). See T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *Int J Con L* 106, 106. Jackie Dugard has also criticised the Court's cases as anti-poor. See Dugard (note 3 above).

12 Because of its focus on engagement, this article deals primarily with the *Joe Slovo* decision and earlier, related, decisions.

cies at all levels. Finally, civil society must expand its role beyond pressing for engagement in individual cases into advocating for such institutionalisation.

I WHAT IS ENGAGEMENT?

Lilian Chenwi and Kate Tissington recently published a handbook for communities outlining the engagement remedy and what it requires.¹³ As they describe it '[m]eaningful engagement is an important development in the approach of the courts to enforce socio-economic rights and promote active participation in service provision'.¹⁴

Chenwi and Tissington note that the Court discussed the concept in earlier cases, most notably *Port Elizabeth Municipality v Various Occupiers*,¹⁵ but it first applied the remedy in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* – a case challenging the eviction and relocation of several inner-city residents as part of Johannesburg's redevelopment programme.¹⁶

Olivia Road held that engagement is required by several constitutional rights, including the right to access to adequate housing and the rights to life and human dignity, and also described several key features of engagement.¹⁷ First, engagement does not presuppose any substantive outcome. For example, in the housing context, some situations require 'mak[ing] permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless'.¹⁸ Second, in most cases engagement cannot be 'ad hoc'.¹⁹ This means that long-term planning for social welfare policy must involve engagement with affected citizens from the start and requires a cadre of 'competent sensitive council workers skilled in engagement'.²⁰ Third, civil society groups have a constitutionally recognised role to assist vulnerable populations in the engagement process and to 'facilitate the engagement process in every possible way'.²¹ Finally, the government must develop and maintain a public record of each engagement so that courts can later review not only the outcome but also the engagement process: 'the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality with that process would ordinarily be essential'.²² This is important because '[t]he absence of any engagement or the unreasonable response of a municipality in the engagement process

13 L Chenwi & K Tissington 'Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right to Housing' (2010) <<http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/ser-publications>>.

14 Ibid 8.

15 2004 (12) BCLR 1268 (CC).

16 2008 (5) BCLR 475 (CC).

17 Ibid.

18 Ibid para 18.

19 Ibid para 19.

20 Ibid para 19.

21 Ibid para 20.

22 Ibid para 21.

would ordinarily be a weighty consideration against the grant of an ejectment order'.²³

Since *Olivia Road*, the Court has used the remedy in only two other cases and discussed it in several others. In *Mamba v Minister of Social Development*, the Court ordered the Gauteng government and others to engage with representatives of internally displaced refugees of the anti-immigrant violence that swept South Africa in early 2008 over the timing and procedures for closing the refugee camps.²⁴ The engagement order in that case largely mirrored the *Olivia Road* order but added a lengthy list of specific organisations with which the government entities were required to engage.²⁵ Unlike *Olivia Road*, in which engagement successfully settled the dispute, in *Mamba*, the Gauteng government largely ignored the Court's order and interpreted its obligations as limited to reporting the continuing progress of its closure plans rather than negotiating over those plans.²⁶ The plaintiffs sought dismissal of the case as moot once the camps were closed and so the Court never addressed the issue whether the government's cribbed interpretation was consistent with the engagement order.²⁷

More recently, in *Joe Slovo*, the Court incorporated a detailed engagement order as a condition for permitting the City of Cape Town to proceed with the eviction of over 20,000 residents of the Joe Slovo settlement.²⁸ Two aspects of *Joe Slovo* represent important innovations in the Court's use of engagement. First, it shows that courts can use engagement to return some measure of control to the parties following a substantive decision on the merits in a socio-economic rights case. Second, the detailed engagement order is a good example of a more court-directed form of engagement than in either *Olivia Road* or *Mamba*. Both features show that engagement can involve relatively strong court control and also that it can be combined with partial or complete resolution of substantive legal issues while still maintaining some flexibility over the implications of a particular interpretation.²⁹

Collectively, these decisions sketch the rough outline of a highly flexible and potentially important aspect of the socio-economic rights (and possibly other) provisions in the Constitution. It is clear that government has an obligation to engage – and engage early – whenever it develops social welfare policy and certainly well before any threat of litigation emerges. Citizens affected by those policies and civil society organisations have a constitutional claim

23 Ibid.

24 CCT 65/08, Court Order dated 21 August 2008 (CC).

25 Ibid para 5.

26 *Mamba* Duncan Breen's September 2008 affidavit in terms of para 3 of the Court order dated 21 August 2008, 8, 22, 31–43 (describing the sequence of events following the order and concluding: 'In my view one cannot describe [the single meeting the Gauteng government attended] as a "meaningful engagement" as required by the Constitutional Court order').

27 CoRMSA press release (16 October 2008).

28 *Joe Slovo* (note 8 above) para 7.

29 I develop this idea more fully in 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy' (forthcoming 2010) *Washington U Global Studies L Rev*.

to seek engagement and should be able to enforce their right to engagement through litigation.

On the other end of the spectrum, courts can inquire whether the government has adequately engaged with affected citizens in every case challenging social-welfare policies and to order further engagement where necessary. When ordering engagement, courts after *Joe Slovo* have the authority to control the engagement agenda and to order engagement with non-parties. Courts can also combine engagement with partial or complete substantive determinations of the legal issues in the case.

Beyond these very general parameters, however, when and how government must engage remains unclear and this lack of clarity hampers the effectiveness of the remedy. Perhaps most important is the lack of a direct precedent sanctioning the government's failure to engage meaningfully – both *Joe Slovo* and *Mamba* were missed opportunities for enforcing *Olivia Road*'s statement that the lack of meaningful engagement can itself be grounds for refusing to permit government to proceed with implementation of a policy. But it is not only the courts that must develop engagement. The government and civil society are equal players and have constitutional roles to establish policies, procedures and standards for engagement even absent court direction.

The Court's recent reversal of the *Joe Slovo* eviction order both underscores the importance of engagement and the difficulties and uncertainties surrounding implementation of the process.³⁰ The Court highlighted the central role that engagement played in the original eviction order to explain why the 21-month delay required lifting it. It cited four reasons why the parties could no longer comply with the order. First, the government no longer planned to relocate residents; second, the original timetable (including the time-frame for engagement) had become irrelevant; third, '[t]here has been little or no engagement in relation to the relocation process nor is there likely to be any engagement in relation to relocation in the future'; and, finally, much of the order served no purpose without relocation, engagement and the division of residents into those who could return and those who could not.³¹ Summing up the net effect of abandoning relocation and the consequent need for engagement over its details, the Court stated that '[t]he only part of the order that would remain if all of these aspects fall away is the bare, unconditional, order requiring all the applicants ... to vacate the *Joe Slovo* area'.³² In other words, the right to evict without the corresponding duty to comply with the detailed and carefully structured engagement order was no longer 'just and equitable' under all the circumstances.³³

It is also important to note that the opportunity for the Court to address these changed circumstances was a direct result of the detailed time-frame

30 It is also worth noting that this decision is one of the first in which the newly configured Court has addressed the engagement remedy. *Joe Slovo II* (note 10 above) paras 18–9 (noting that seven members of the Court participating in this decision did not participate in the first decision).

31 Ibid para 30.

32 Ibid para 31.

33 Ibid.

and reporting requirements that the Court included as part of the engagement order.³⁴

In the high-profile and politically sensitive context of the mass eviction of the Joe Slovo community, the Court was able to muster the institutional energy to address the government's delayed response and to take the highly unusual step of reversing its own decision on the basis of those changed circumstances. But it will not always be possible for courts to shift course and correct their own orders where the underlying situation has changed. More importantly, the substantial uncertainty over how courts can and should structure engagement orders and subsequent interventions like this one makes the potential benefits of the process highly contingent and uncertain.

Before turning to some initial suggestions for how courts, government and civil society can begin to develop engagement, I will briefly outline the theoretical underpinnings of engagement – in particular, the relationship between engagement and participatory democracy that the Court has emphasised. Drawing this connection helps to explain how engagement can become an important tool not only for enforcing the socio-economic rights in the Constitution but also for developing a sustained commitment to constitutional democracy more generally.

II ENGAGEMENT AS PARTICIPATORY DEMOCRACY

Theunis Roux has argued that the Constitutional Court's approach to socio-economic rights is representative of what he calls the Court's mix of pragmatism and principle in constitutional adjudication more generally.³⁵ With the notable exception of the *Treatment Action Campaign* decisions, he characterises the socio-economic rights cases as pragmatic decisions in which the Court has relied on a flexible conception of separation of powers and adopted context-specific tests to manage its relationship with the political branches.³⁶ For Roux, the reasonableness test the Court has used in each of its socio-economic rights cases is a prime example of a pragmatic approach because it is case-specific and gives the Court ample room to manoeuvre in subsequent cases that might have serious political overtones.³⁷ He contrasts this pragmatism with other instances in which the Court was able to take a harder – and, in his view, more principled – approach either because the African National Congress (ANC) supported the decision or because it aligned with broader public opinion despite ANC opposition.³⁸

By focusing on the political undercurrents of the cases he selects, Roux's analysis highlights an important dimension of those cases and provides a more complete picture of the disputes involved. But Roux's claim that whenever the Court adopts a context-specific test, like the reasonableness test, the Court is

34 Ibid paras 5–16 (describing the parties' negotiations and the Court's responses).

35 Roux (note 11 above) 135–6.

36 Ibid.

37 Ibid.

38 Ibid 137–8.

acting out of institutional self-interest and ignores the Court's emphasis on participatory democracy. Taking that aspect into account provides an alternative – and importantly, principled – explanation for the Court's approach. Rather than simply setting up room to manoeuvre in a future case with potential political consequences, the flexibility of the reasonableness test generally – and the engagement remedy specifically – is designed to create interaction between affected citizens and the government over the constitutional values these rights represent.

Viewed from this perspective, the socio-economic rights decisions are part of the Court's larger interest in using its decisions to develop a broad-based and sustained commitment to constitutional democracy in South Africa. This is, I think, what the Court means when it speaks of participatory democracy – a dialogue between the government and the citizens it serves over constitutional values.³⁹

Procedural remedies like engagement promote that kind of dialogue and thus give the courts an important role to play while still democratising the process of constitutional development. The result is a collaborative model of constitutional development in which courts, citizens and the political branches each participate in negotiating the meaning of the Constitution.

While Roux is clearly correct that the flexibility of remedies like engagement allow the Court in many cases to avoid direct confrontation with the political branches over policy decisions, the Court's interest in avoiding such conflict is as much driven by a desire to give these rights effect while initiating a national conversation over what they require as it is in preserving itself. In this respect, the Court is responding to the problem of building legitimacy identified by James Gibson and Gregory Caldiera in a series of surveys of the South African public's views of the Constitutional Court. Gibson and Caldiera conducted a panel survey of South Africans in 1996 and 1997 to test if what they call 'legitimacy theory' applies to the Constitutional Court.⁴⁰ Legitimacy theory hypothesises that courts achieve the moral authority necessary to obtain compliance with controversial decisions where the society 'view[s] courts as appropriate institutions for such decisions' and have a 'dedication to the health and efficacy of an institution [that] overrides dissatisfaction with its immediate outputs'.⁴¹ Their initial survey results showed that the Court lacked substantial legitimacy.⁴²

Gibson conducted a follow-up survey in 2004 to study if the Constitutional Court and the South African Parliament had developed legitimacy over time.

39 In 'Demosprudence in Comparative Perspective' (forthcoming 2010) *Stanford J of Int Law*, I develop a more extended response to Roux and identify engagement as one of several examples of the Court's broad concern with participatory democracy. 'Demosprudence' is a concept developed by L Guinier & G Torres in 'Forward: Demosprudence Through Dissent' (2008) 122 *Harvard L Rev* 4.

40 J Gibson & G Caldiera 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court' (2003) 65 *J Pol* 1.

41 Ibid 2.

42 Ibid 3.

In this study, Gibson tested what he calls 'a theory of "positivity bias"'.⁴³ Positivity bias posits that courts gain institutional legitimacy when citizens are repeatedly exposed to the symbols of the court itself, because such exposure develops an understanding and expectation that courts are separate from regular politics. Gibson explains that it is repeated exposure that is important, not necessarily the substantive outcome that results in the exposure. Therefore, 'even when the initial stimulus for paying attention to courts is negative (for example a controversial court decision), judicial symbols enhance legitimacy ...',⁴⁴

Gibson concluded that from 1996 to 2004 public support for the Constitutional Court has slowly grown – with significant differences among different racial and ethnic groups.⁴⁵ He argued that two things must happen for South Africa's democratic experiment to continue to succeed. The first is that 'a democratic political culture must be nourished. Both the citizens and the elites must commit themselves to the institutions and processes of democracy'.⁴⁶ The second is that 'effective and legitimate political institutions must be created and sustained'.⁴⁷ In Gibson's view 'the Constitutional Court is particularly important on this score, especially since the dominant problem of African democracies today is their illiberalism (their lack of respect for minority rights)'.⁴⁸

Engagement dovetails nicely with this prescription because it gives courts a tool to actively manage a process of exposure both to the judiciary itself and, more importantly, to the constitutional principles that its judgments enforce. Engagement requires the political branches to pay specific attention to their constitutional responsibilities when developing social policies and to consult citizens on their own views of what the Constitution requires. Applied consistently this creates the opportunity for sustained and repeated exposure to the Constitution – precisely the kind of exposure that Gibson says is necessary to develop legitimacy over time. The courts act as managers of this process intervening where necessary to ensure that engagement is meaningful and determining when additional engagement is necessary.

III DEVELOPING ENGAGEMENT

For engagement to act as a legitimacy-creating mechanism, however, requires courts to continue to develop the remedy, and, in particular, to intervene where government fails meaningfully to engage. It also requires the state to commit to a comprehensive development of engagement policies and procedures and institutionalisation of those policies and procedures throughout the admin-

43 J Gibson 'The Evolving Legitimacy of the South African Constitutional Court' in F du Bois & S du Bois-Pedain (eds) *Justice and Reconciliation in Post-Apartheid South Africa* (2009) 233.

44 Ibid 234.

45 Ibid 260–2.

46 Ibid 262–3.

47 Ibid 263.

48 Ibid.

istrative state. Finally, civil society must expand its role beyond facilitating specific engagements into advocating for such comprehensive development and institutionalisation, including by using its experience and expertise to offer suggestions for engagement policy.

The Socio-Economic Rights Project of the Community Law Centre at the University of Western Cape and the Socio-Economic Rights Institute of South Africa (SERI) co-hosted a roundtable on engagement in March 2010 that took the first steps towards addressing the many unanswered questions engagement raises.⁴⁹ Participants included representatives of civil society organisations, public interest lawyers, community leaders and government officials. The willingness of those diverse players to recognise the potential importance of engagement and to work together to begin a process for developing it is in itself an important step. However, a central theme of the roundtable was the tremendous uncertainty surrounding engagement and the immense practical problems that conducting meaningful engagement poses. In the following paragraphs, I offer some very preliminary suggestions for addressing some of the questions and challenges that the roundtable raised.

(a) Institutionalising engagement

One of the major issues of the discussions was the lack of a clear understanding of the role government should play in engaging affected communities during the policy-development process. Related to this, Lauren Royston, a principal at Development Works and advisor to the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, said that many organisations and activists feel that the Court's precedents to date 'plac[e] too much responsibility on NGOs and communities with insufficient emphasis on the role the state (government) should perform'.⁵⁰

Participants also noted that, even where government is willing to engage, the process raises significant practical difficulties, including deciding at what point to engage with affected communities, defining relevant communities and stakeholders, establishing effective channels of communication, and determining at what point it has sufficiently engaged despite the lack of a clear consensus.

There is no doubt that the Constitutional Court and lower courts have much work to do in defining more specifically the role that government should play and, in particular in insisting that when government fails to engage it will not be permitted to implement the resulting policy. But *Olivia Road* imposes a key programmatic requirement – that government avoids ad hoc engagement whenever possible and that doing so requires a cadre of employees trained in engagement.⁵¹ This means that government at all levels must begin to develop

49 'Report on the Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights' (4 March 2010) (Roundtable) <<http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/conference/previous-conference>>.

50 Ibid 5.

51 *Olivia Road* (note 16 above) para 21.

a bureaucratic structure focused on engagement. A robust implementation of this requirement would itself go a long way towards alleviating many of the problems the roundtable participants identified. A bureaucratic structure focused on engagement can help bring consistent attention to the state's engagement obligations and the underlying constitutional values engagement is intended to protect.

Trevor Mitchell, the head of housing and policy research for the City of Cape Town, stated during the roundtable discussion that engagement typically takes place at the project level.⁵² This was confirmed by Myrtle Stuurman, assistant director of policy in the Department of Local Government and Housing for the Western Cape.⁵³ While the specific negotiations of each individual engagement clearly must relate to specific projects, government officials should take a much broader view of their engagement responsibilities and work to develop a more generalised capacity for engagement outside of specific projects. To ensure systematic implementation of engagement, government must adopt a more comprehensive approach that does not reinvent new engagement policies and practices each time a project reaches the planning and implementation stage. Royston's call for a comprehensive strategy on engagement in the eviction context and for a broader strategic discussion is one way to get governments to begin thinking about engagement in a more systematic way.⁵⁴

Institutionalising engagement in this way can help alleviate the problem of lack of cohesion that was a repeated theme in the roundtable discussion. Officials with training and experience are more likely to become adept at dealing with internal community conflict and can bring opposed groups together in the engagement process. By contrast where engagement is conducted ad hoc by officials whose primary role involves substantive service delivery there is a real risk engagement will fail for lack of proper training. Moreover, more consistent engagement is possible where a government has a permanent infrastructure devoted to the process. Lilian Chenwi's suggestion that government establish an outreach programme for communities is one example of the kind of institutional functions this bureaucratisation can perform.⁵⁵

Institutionalisation should also enhance the capacity and willingness of government to approach engagement from a holistic rather than narrow perspective. Creating a bureaucratic structure tasked specifically with developing an engagement programme and policies for implementing the engagement requirement creates the kind of sustained and long-term focus on the process necessary to make engagement a meaningful process. Over time, officials focused on engagement can begin to develop best practices for engagement that can be applied across programmes.

52 Roundtable (note 49 above) 8.

53 Ibid 10.

54 Ibid 11.

55 Ibid 8.

Charles Epp's work on the development of what he calls the 'legalized accountability' administrative model offers important insights into both the mechanism for developing this institutionalisation and its potential to make engagement into a meaningful process for protecting social and economic rights.⁵⁶ Epp argues that '[i]n the modern state, rights are empty promises in many contexts unless they are given life in administrative policies and practices'.⁵⁷ He has documented a shift in a range of areas in which 'U.S. administrative governance became significantly, even dramatically more rights-focused; the rights policies at the heart of the change became institutionalized and integrated into government agencies in substantial administrative depth'.⁵⁸

In a recent book, Epp analyses evidence of the development of the legalised accountability model in three areas: police use of force, workplace sexual harassment, and playground safety in the United States and the United Kingdom.⁵⁹ In each instance, organisation and bureaucratic reforms to protect civil rights developed in response to social-movement group pressure, including legal pressure. Epp emphasises that the model made rights real through 'administrative systems that are *legally framed* and *comprehensive*, encompassing a range of mechanisms for changing individual behavior and organizational culture' to advance new norms.⁶⁰ Epp identifies three characteristics these mechanisms share: (1) '*administrative policies* that state an organizational commitment to legal norms ...'; (2) '*training and communication systems* intended to convey the importance of these policies and to change organizational culture in keeping with them'; and (3) '*internal oversight* aimed at assessing progress in this endeavour and identifying violations of the policy'.⁶¹

Epp's principal example of this model is the development of institutionalised policies and practices to address the problem of police brutality in the 1960s and 1970s in the US. Epp notes that a key report to the US President's Commission on Law Enforcement and the Administration of Justice in 1967 outlined the basic framework for the legalised accountability model.⁶² After concluding that the problem required developing centralised policies, the Report described what Epp calls the essential elements of the model:

Rules: Departments, relying on careful internal research into 'problem areas', should systematically develop clear internal administrative rules governing officer discretion. Departments, the report urged, should employ internal legal advisers to aid in developing such policies. Training: After adopting such rules, departments should systematically disseminate them so that all officers are aware of them, and should provide ongoing training so that officers know how to follow policies in practice. Oversight: After such implementation, departments

56 C Epp *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalist State* (2009).

57 C Epp 'Implementing the Rights Revolution: Repeat Players and the Interpretation of Diffuse Legal Messages' (2008) 71 *Law & Contemp Probs* 41.

58 Ibid 42.

59 Epp (note 56 above) 216.

60 Ibid 25.

61 Ibid.

62 Ibid 47–9.

should carry out ongoing review of the policies' effectiveness and should devise appropriate methods of 'internal control' over officers' actions.⁶³

While the problem of developing engagement policies is not directly analogous to reforming police practices, there are sufficient similarities that the model Epp describes can be usefully adapted. Taking the key elements in turn, research-based rules for conducting engagement could be developed over time and through a centralised and consistent framework. Rather than using internal legal advisers, in the engagement context, professionals trained in alternative dispute resolution technique and theory would be the more appropriate place to look for analogous guidance in developing specific rules for when and how to engage.

The role of training is obvious but reinforces the need for institutionalisation. Once government develops engagement policies and procedures, it must disseminate those policies and train officials to implement them. Unlike in the police context, the challenge for engagement is not to reform the practices of an existing professional culture. Instead, it requires building a new one to implement engagement on a consistent and sustained basis. While in many respects that challenge is much easier because it does not involve altering an entrenched culture, it will require redeploying scarce resources.

Finally, oversight would play out in a very different way for an institutionalised approach to engagement than for police-reform. It will be important to ensure that individual engagements are conducted in compliance with the centralised policies and procedures, but the real focus of oversight should be the development of best practices for engagement. Each engagement will bring its own specific challenges and require adaptation of the basic model, but some aspects of engagement can be generalised and applied systematically across engagements. Abstracting these broader lessons from each individual engagement and using them to improve the centralised engagement policies and procedures allows for an iterative process of continual improvement over time.

Susan Sturm's and Howard Gadlin's analysis of the Center for Cooperative Resolution/Office of the Ombudsman (CCR) at the US National Institutes of Health (NIH) offers a potentially useful set of principles for developing best practices for engagement.⁶⁴ CCR is a conflict resolution programme within NIH that, in addition to resolving specific disputes within the organisation, has sought to identify systemic issues within those disputes and develop solutions to those issues over time. Sturm and Gadlin analysed CCR's programme and identified four elements of a conflict-resolution process capable of generating systemic change: '(1) a boundary-spanning institutional intermediary, (2) root cause methodology, (3) institutional legitimacy within communities of practice, and (4) participatory accountability'.⁶⁵

63 Ibid 49.

64 S Sturm & H Gadlin 'Conflict Resolution and Systemic Change' (2007) *J Disp Resol* 1.

65 Ibid 39.

An institutionalised approach to engagement could be structured similarly to CCR – something like an engagement department – and incorporate each of these elements. Instead of focused on the internal operations of a particular government entity, such an engagement department would be tasked with developing policy and procedures for engagement across substantive policy areas, with housing as the obvious initial target given the Court’s development of engagement within the eviction process. Establishing a separate entity within government would satisfy Sturm’s and Gadlin’s first requirement of a boundary-spanning intermediary, which they argue is necessary to identify systemic problems across individual interventions.⁶⁶ Like the CCR, a separate engagement department could more easily identify patterns among individual engagements and refine the engagement process to respond more effectively in particular situations.

Separating engagement from the government department responsible for developing substantive policy would also create the kind of dual insider/outside perspective that Sturm and Gadlin identify as a key strength of CCR.⁶⁷ This is critical for Sturm’s and Gadlin’s second element – root-cause analysis. Root-cause analysis simply means identifying systemic issues that give rise to individual disputes and identifying solutions to address those issues on a broader scale. Applied to engagement, root-cause analysis could take at least two forms. First, it would mean developing the kind of best practices for engagement I suggested earlier. Second, it could also involve identifying systemic issues in the policy-development processes used by government at different levels that give rise to community protest.

Divorcing engagement from substantive policy development would also put those involved in a position to interact more freely with affected communities and civil society organisations active on socio-economic rights issues. As more neutral players, engagement officials would have greater credibility with these external constituencies and also greater capacity to develop the institutional legitimacy within those communities that Sturm and Gadlin identify as the third element of CCR’s successful model.

Finally, participatory accountability means that the results of each engagement as well as the details of the engagement process must be subject to public comment and reaction and there must be a mechanism for incorporating those critiques into revised engagement policies. As the roundtable participants noted, transparency in and monitoring of individual engagements is crucial.⁶⁸ The public-reporting requirement *Olivia Road* established can play a key role here by requiring that government document the processes of each engagement and make those reports available for public comment by citizens and organisations that were not directly involved.

⁶⁶ Ibid 40.

⁶⁷ Ibid.

⁶⁸ Roundtable (note 49 above) 16.

(b) Civil society pressure

As noted above, the roundtable participants expressed concern over the Court's emphasis on the role of NGOs and civil society groups. This concern is valid and the government itself must begin to assume a leadership role. But Epp's work suggests that civil society has a critical role to play not merely in assisting individual engagements but, more importantly, in applying consistent pressure on government to institutionalise its approach to engagement. Success on that broader programmatic level can create the kind of institutional capacity that will relieve pressure on civil society over the long term.

To be sure, social rights advocates must continue to assist in individual engagements. And one key issue on that level is ensuring groups represent the views of the community. Non-governmental organisations (NGOs) active on particular issues bring the advantage of a broader understanding of the issue on a national level and can bring that broader perspective to the discussion. At the same time, however, they must ensure that the views of the particular community or communities directly affected are adequately presented. As S'bu Zikode, a leader of the Abahlali shack-dwellers movement eloquently put it in his statement at a meeting on engagement hosted by CALS:

It is one thing if we are beneficiaries who need delivery. It is another thing if we are citizens who want to shape the future of our cities, even our country. It is another thing if we are human beings who have decided that it is our duty to humanize the world.⁶⁹

Civil society's role in individual engagement is to empower citizens to play the kind of active role this describes and which participatory democracy envisions.

In addition to paying careful attention to their role in individual engagements, however, social rights advocates should expand their efforts to include advocacy – and, where necessary, litigation – to develop an institutionalised approach to engagement. Epp notes that despite the call for administrative reform by the 1967 report and others, real police reform did not begin to take root until the 1980s and 1990s and only then as the result of a strategic litigation campaign focused on establishing liability specifically for the failure adequately to train and manage frontline police forces.⁷⁰ As Epp describes it 'the development of a legal norm favoring legalized accountability in policing ... grew less from police departments' innovations than from two other sources: activist pressure and a reform campaign among policy experts on the border of policing and academia'.⁷¹

Following Epp's model, putting pressure on government to institutionalise its approach to engagement will require three elements. The first is a concerted political effort to raise the profile of engagement. The roundtable and the CALS conference that preceded it are a significant start in this process. SERI's proposal for a follow-up housing indaba and the apparent receptivity

69 'Meaningful Engagement' (24 July 2009) <<http://www.abahlali.org/node/5538>>.

70 Epp (note 56 above) 87–90.

71 Ibid 90.

of some government officials to the idea shows further promise.⁷² It will be important, however, to shift the conversation away from the specifics of individual engagements into the need for institutionalisation described above.

This raises the second element of Epp's model: collaboration with policy experts and academics. In Epp's account it was not only activist pressure and litigation that succeeded in institutionalising police reforms, but also the development of practical ideas for administrative reform by policy experts with knowledge of the police field but who were based at universities or other outside institutions.⁷³ Successful institutionalisation of engagement will require developing the same kind of expertise with academics and other experts in areas such as urban planning and dispute resolution design.

The third element is litigation. The conversation that has already started over engagement was the direct result of the highly successful effort in *Olivia Road*. Since that remarkable decision, however, engagement has played a relatively modest role in litigation. *Abahlali* represents successful deployment of the concept to overturn state policy inconsistent with its values, and *Joe Slovo* – while arguably a failure to enforce meaningful engagement prior to eviction – represents a successful use of engagement as a tool for mitigating the effects of a negative court ruling. It also offers an important new model for court-directed engagement. But Epp's studies suggest that real reform is most likely to develop where the government faces a consistent threat of potential liability in litigation for failing to develop administrative reforms.

(c) Court enforcement

For the threat of litigation to actually provoke reform thus requires not merely activists willing to bring cases, but also courts that are responsive to their claims. Kate Tissington pointed out that, despite the relative success of engagement in *Olivia Road*, that experience shows a clear reluctance by government to engage on issues other than those that a court directly enforces: '[g]overnment addresses only the issues they are ordered to address ... when other issues arise, at a later stage, it becomes difficult to get government to address these issues'.⁷⁴

The Court's few experiences using the engagement remedy reinforce the need for relatively strong court involvement at least until the government develops an adequate engagement infrastructure. In *Mamba* the Court's repeated engagement orders were almost completely ineffective. The Gauteng government simply moved forward with its closure plans and never seriously considered the arguments raised by the refugees.⁷⁵ If the Court had combined the engagement order with a temporary injunction against closing

⁷² Roundtable (note 49 above) 15–6.

⁷³ Epp (note 56 above) 90–1.

⁷⁴ Roundtable (note 49 above) 7.

⁷⁵ See 'Refugees Turfed Out of their Tents' IOL online (7 October 2008) <http://www.iol.co.za/index.php?set_id=1&click_id=3069&art_id=nw20081006172807464C184214>.

the camps, the government would have had much greater incentive to engage meaningfully.

The *Joe Slovo* experience offers further evidence that relatively strong court intervention is still necessary to provoke meaningful engagement. As Tissington also noted, 'there were strong doubts on the quality of [the pre-eviction] meaningful engagement' in that case.⁷⁶ It was only after the Court ordered engagement over the details of the eviction process itself – including devising a detailed agenda of issues for that engagement and specifically requiring reservation of a set percentage of new homes for community residents – that the government finally took seriously the possibility of in situ upgrade that was a key demand of the residents.⁷⁷

The *Joe Slovo* litigation thus illustrates the difference that strong court intervention can make. Prior to the eviction the lower courts refused to recognise the government's failure to engage and, like in *Mamba*, the government was able to proceed with its plans. Quoting Justice Albie Sachs, Sandra Liebenberg succinctly summarises the inadequacy of the engagement process prior to eviction:

the willingness to effectively condone the inadequate consultation processes raises serious concerns. This consultation process was littered with mixed messages conveyed by an array of officials, broken promises and, in the words of Judge Albie Sachs, the 'frequent employment of a top-down approach, where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself'.⁷⁸

Liebenberg goes on to note that, notwithstanding the majority's conclusion that the consultations satisfied the government's engagement duties, in fact, '[t]his represents the antithesis of the "structured, consistent and careful engagement" by "competent, sensitive" officials skilled in engagement which the court has previously underscored when state organs seek to evict large groups of vulnerable people'.⁷⁹

The Court's unwillingness to hold the government accountable for its insufficient engagement efforts by at least temporarily delaying the eviction directly was a missed opportunity to demonstrate the Court's commitment to enforcing *Olivia Road's* directive that '[t]he absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejection order'.⁸⁰

⁷⁶ Roundtable (note 49 above) 4.

⁷⁷ Among other things, the *Joe Slovo* order required parties to 'the exact time, manner and conditions [of relocation]' and 'the precise temporary residential accommodation units' for relocation. *Joe Slovo* (note 8 above) paras 11.2–11.3. The government's reversal of its position on eviction was reported in the media. See Majavu (note 9 above).

⁷⁸ S Liebenberg 'Joe Slovo Eviction: Vulnerable Community Feels the Law from the Top Down' <<http://www.businessday.co.za/articles/Content.aspx?id=73812>>.

⁷⁹ Ibid.

⁸⁰ *Olivia Road* (note 16 above) para 21.

On the other hand, once the Court ordered the government to engage over the details of the eviction process itself, the government was forced to reconsider its plans. Unlike the *Mamba* order that, beyond listing the parties and setting a reporting deadline, left the details of engagement to the parties themselves, the *Joe Slovo* order imposed significant constraints. First, the Court established a detailed engagement agenda, including ‘the exact, time, manner and conditions’ of the relocation and also ‘the precise temporary residential accommodation units’ for the relocated residents.⁸¹ While well short of an injunction stopping the eviction process altogether, this agenda slowed the process substantially and provided the residents with substantial leverage with the government.

Second, the Court imposed two substantive requirements for the eviction to proceed: it established detailed standards for the temporary accommodations in Delft, and it ordered the government to allocate 70 per cent of the low-cost housing units in Joe Slovo to displaced residents. This represents a different form of court control – making substantive determinations regarding plaintiffs’ rights and conditioning engagement on the fulfilment of those obligations. Unlike establishing an engagement agenda or even a full-scale injunction both of which halt or slow the implementation of policy, making substantive determinations of this kind sets a baseline for engagement over the remaining issues.

The Court’s subsequent reversal of the eviction order further illustrates the importance of relatively robust court involvement. As the Court noted, the government’s decision to abandon wholesale eviction rendered the carefully structured engagement order meaningless. While the residents won the overall battle to avoid wholesale relocation, the government’s opposition to lifting the eviction order demonstrated its desire to maintain the authority to evict some proportion of the residents – and at the same time to avoid the constraints of the original order. The Court’s direct intervention to avoid that possibility sets up the opportunity for it or a lower court to condition any later eviction on further engagement structured to address the situation as it develops.

With the notable exception of *Khosa*, the Court has been extremely reluctant to intervene in either of these ways – to slow implementation or make direct changes to large-scale social and economic programmes that are already well advanced. In *Olivia Road* the Court’s intervention was arguably easier because the lower court had issued an injunction and the government had not restarted the programme prior to the engagement.⁸² Even in *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (5 July 2002) – which is widely hailed as one of the Court’s most muscular enforcement efforts – there were clear signs of a shift in government policy and the Court’s order

81 *Joe Slovo* (note 8 above) para 11.

82 *Olivia Road* (note 16 above).

simply reinforced that shift.⁸³ For engagement to begin to work in the way the Court hopes, however, it must be willing to enjoin government programmes in cases where the record demonstrates a lack of real engagement. And, as in *Joe Slovo*, it should be willing to make substantive rights determinations where appropriate. In the short run, this will involve greater intervention in substantive policy than the Court has typically conducted in the past. But, so long as the injunction merely halts progress subject to further engagement, then the Court can still avoid directly fashioning social and economic polices. Even where it makes a substantive determination, if those determinations only partially resolve the issues and are limited to the details of a policy, the Court can still avoid wholesale policy-making while providing leverage to citizens challenging the policy. Furthermore, Epp's study suggests that, over time, strong initial court interventions combined with sustained civil society pressure for reform can catalyse the institutionalisation and development of a bureaucratic culture committed to engagement that can begin to take the courts out of the process altogether.⁸⁴

IV CONCLUSION

In *Port Elizabeth*, Justice Sachs introduced engagement for the first time:

The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavor to find mutually acceptable solutions. Whenever possible, face-to-face engagement or mediation through a third-party should replace arms-length combat by intransigence opponents.⁸⁵

The Constitutional Court's and lower court's recent deployments of the engagement remedy and civil society's and government's strong interest in developing the concept into a practical tool for implementing social and economic rights are promising signs that Justice Sachs' vision of a managerial court assisting adverse parties to discover mutually acceptable solutions to their disputes has begun to take root. But developing engagement's promise as an effective remedy will require considerable effort and sustained attention by the courts, civil society and government. Government must commit to developing a robust infrastructure for engagement and to institutionalise engagement policies and procedures across the board. To ensure that institutionalisation, the Court itself must be willing to at times step out of its purely managerial role and occasionally make substantive determinations of what these rights require as well as to prevent government from proceeding with policies where engagement was clearly inadequate. Civil society can assist in this process through sustained pressure on government and by bringing

83 See A Kapczynsk & J Berger 'The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa' in D Hurwitz & M Satterthwaite (eds) *Human Rights Advocacy Stories*.

84 Epp (note 56 above).

85 *Port Elizabeth* (note 15 above) para 39.

cases not only to enforce engagement in individual instances but also to call attention to government's lack of sufficient institutionalisation. Without such sustained effort, engagement runs a real risk of fulfilling the fears of those who have objected to the Court's preference for procedural remedies and proceduralisation's triumph will mean the loss of the transformative potential of these rights.



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